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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

MYLES ALEC GIPSON,

Defendant and Appellant.

A158948

(Marin County
Super. Ct. No. SC209100A)

Myles Alec Gipson pled guilty to vehicle theft (Veh. Code § 10851, subd. (a)). As relevant here, the trial court sentenced him to state prison and imposed a restitution fine, and court operations and criminal conviction assessments, totaling \$370. Gipson appeals, claiming the court erred by presuming his ability to pay the fine and assessments “based on future prison wages.”

We affirm the judgment and direct the trial court to correct the abstract of judgment to accurately reflect the sentence imposed.

FACTUAL AND PROCEDURAL BACKGROUND

Law enforcement officers found stolen property worth at least \$20,000 in Gipson’s van and arrested him. The prosecution charged Gipson with several crimes, including taking a vehicle without the owner’s consent (Veh. Code § 10851, subd. (a)), and Gipson pled guilty to the charge.

Probation recommended the court impose a \$300 restitution fine (Pen. Code, § 1202.4), a \$40 court operation assessment (Pen. Code, § 1465.8), and a \$30 criminal conviction assessment (Gov. Code § 70373). It noted Gipson, a high school graduate, was employed and, according to his counsel, “was making \$2,000 a month.”

At sentencing, defense counsel requested the court waive the fine and assessments based on Gipson’s “lack of current assets [and] lack of current employment.” The court denied the request, stating “if a person is going to state prison, that’s not a reason to not order the fines and fees. . . . [The person] can use . . . prison wages to pay the fines and fees.” It imposed a mandatory minimum restitution fine and mandatory court operations and criminal conviction assessments. The court sentenced Gipson to four years in state prison.

DISCUSSION

Relying on *People v. Dueñas* (2019) 30 Cal.App.5th 1157, Gipson contends the court erred by presuming his ability to pay the restitution fine and assessments based on “future prison wages.”¹ We are not persuaded.

Sufficient evidence supports the court’s conclusion that Gipson has the ability to pay the restitution fine and the assessments. Courts can consider past income earning capacity and future prison wages to determine ability to pay. (*People v. Johnson* (2019) 35 Cal.App.5th 134, 139.) Here, Gipson

¹ Several courts have declined to follow *People v. Dueñas*, and we find the case distinguishable. (See, e.g., *People v. Petri* (2020) 45 Cal.App.5th 82, 87, 90.) The California Supreme Court is considering whether a trial court must consider a defendant’s ability to pay before imposing or executing fines, fees and assessments, and if so, which party bears the burden of proof regarding inability to pay. (*People v. Kopp* (2019) 38 Cal.App.5th 47, review granted Nov. 13, 2019, S257844.)

previously had a job earning \$2,000 per month, and he will be able to work while in prison. (*Id.* at p. 139 [defendant had “some past income-earning capacity” and “the ability to earn prison wages”].) The relatively short length of Gipson’s sentence does not persuade us he is unable to pay a total of \$370. Additionally, any error in the court’s failure to hold an ability-to-pay hearing is harmless. (*Id.* at p. 140 [imposition of “modest financial burden” without conducting ability-to-pay hearing was harmless error].)

The People contend the restitution fine is “not unconstitutionally excessive” under the federal Constitution. (See *People v. Hanson* (2000) 23 Cal.4th 355, 361–363; *People v. Kopp*, *supra*, 38 Cal.App.5th at pp. 96–97, review granted Nov. 13, 2019, S257844.) We need not resolve this issue because Gipson does not raise an excessive fines challenge in his opening brief. We consider this a concession that the amount in dispute is not constitutionally disproportionate to his offense. (See *United States v. Bajakajian* (1997) 524 U.S. 321, 334, 337–338.)

DISPOSITION

The judgment is affirmed. The trial court is ordered to correct the abstract of judgment to reflect that the court imposed a \$40 court operation assessment (Pen. Code, § 1465.8), and a \$30 criminal conviction assessment (Gov. Code § 70373). The court is ordered to send a certified copy of the corrected abstract of judgment to the Department of Corrections and Rehabilitation.

Jones, P. J.

WE CONCUR:

Simons, J.

Burns, J.

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